

COMMONWEALTH OF KENTUCKY  
MINE SAFETY REVIEW COMMISSION  
ADMINISTRATIVE ACTION NO. 06-MSRC-089

**GARY MICHAEL YOUNG**

PETITIONER

**v.**

**ORDER**

COMMONWEALTH OF KENTUCKY,  
OFFICE OF MINE SAFETY & LICENSING

RESPONDENT

\* \* \* \* \*

**PROCEDURAL HISTORY**

The Petitioner's certificate was suspended pursuant to Kentucky Revised Statutes (KRS) 351.120(12) on October 10, 2006 as a result of his employer's discharge and reporting of an alleged violation of that company's substance and alcohol abuse policy. The Petition of Appeal was filed by Petitioner Gary Young on November 13, 2006. OMSL by counsel filed its response on December 8, 2006. Subsequent to those filings the Notice Scheduling Formal Hearing and Order to appear ("Order") was mailed regular mail and certified mail to Petitioner. The Order was delivered to Respondent on December 4, 2006.

This matter came before the Mine Safety Review Commission for the hearing scheduled for December 14, 2006. Petitioner appeared at the hearing. At the hearing the Respondent, Kentucky Office of Mine Safety and Licensing ("OMSL") made a presentation of the evidence obtained from the Petitioner's

employer and based upon further investigation conducted subsequent to the filing of its Response.

#### FINDINGS OF FACT

1. OMSL is the agency charged with administering the Commonwealth's safety laws as set forth in KRS Chapters 351 and 352 and the Kentucky Administrative Regulations adopted pursuant thereto.
2. Petitioner Gary Young ("Young") was residing at all times relevant hereto at: 4645 Right Fork of Brushy, Varney Ky 41571, and certifications required by the Commonwealth of Kentucky for employment.
3. Petitioner Young is certified as a surface miner and MET by the Commonwealth of Kentucky.
4. Jurisdiction for this action is founded upon KRS 352.390, which provides that the "Mine Safety Review Commission shall revoke, suspend, or probate certificates if it is established in the judgment of the Commission that the holder has become unworthy to hold the certificate by reason of violation of law, intemperate habits, incapacity, abuse of authority, failure to comply with the mining laws of the Commonwealth of Kentucky, or for other just cause;" on KRS 351.025(1), which requires the Department of Mines and Minerals (now the Office of Mine Safety and Licensing) to "promulgate administrative regulations...for the imposition and enforcement of sanctions against certified...personnel...whose intentional violation of, or order to violate, mine safety laws places miners in imminent danger of serious injury or death;" and on 805 KAR 8:030 ("Criteria for the imposition and enforcement of sanctions against certified miners").

5. Service of the Notice and Order upon Petitioner is determined to be perfected pursuant to 825 KAR 1:020 Section 5 (3) and KRS 13B.050.
6. Respondent OMSL stated that the Petitioner's employer was unable or unwilling to verify any of the allegations forming the basis of the suspension.
7. The employer failed to appear and present the factual and legal basis for the suspension although requested to do so and afforded the opportunity despite requests by OMSL.
8. Petitioner opined that he was never asked to take a "drug test" by his former employer and stated that he was leaving that employer at that time for a better schedule to accommodate his child custody arrangement and for a slightly higher wage, a fact he speculated was known to his soon to be former employer.
9. Petitioner Young therefore, moved to **RESTORE** his certifications by **SUSTAINING** his appeal to reinstate his certifications to mine coal in the Commonwealth of Kentucky at this scheduled hearing.

#### CONCLUSIONS OF LAW

Based upon the evidence admitted, and the record taken as a whole, the Commission finds the foregoing facts are established by a preponderance of the evidence. Pursuant to KRS 13B.090(7) the agency, OMSL, has the burden to show the propriety of the removal of a benefit previously granted and the Petitioner in asserting any affirmative defense has the burden of establishing that defense. Therefore, it was **not established** in the judgment of the Commission that holder was unworthy to hold the certificate. Further the Commission does **NOT** find violations of Kentucky's mine safety laws set out in the Response of

record herein, and therefore Petitioner is **NOT** subject to the imposition of sanctions as provided in KRS 352.390 and 805 KAR 8:030. Thus Petitioner Young's Petition is **SUSTAINED**.

#### **FINAL ORDER**

**WHEREFORE,** it is hereby **ORDERED** by the Mine Safety Review Commission:

1. The Petition of Appeal as to Gary Michael Young is **SUSTAINED**.
2. Young's miner's certificates shall be **RESTORED** immediately.
3. This Final Order only resolves the matters referenced herein, and any new enforcement action or subsequent penalties imposed during any probationary period are in addition to and not in lieu of those that may be sought by OMSL for the acts or omissions during that probationary period. This Final Order in no way prohibits OMSL from investigating or filing legal action based upon other activities or omissions by the Petitioner not arising from the factual basis of the original violation and resolved herein.
4. This Final Order represents a final disposition of all issues between the Petitioner and the Respondent, in these matters. Failure of any party to comply with the terms and conditions of this Final Order may result in further action by the Commission; and
5. Appellate rights: Pursuant to KRS 351.194(8) and KRS 13B.140(1), an appeal of an order of the Commission must be filed in the Franklin Circuit Court within thirty (30) days of the entry of this Final Order. The petition shall include the names and addresses of all parties of record in this proceeding and shall include a statement of the grounds upon which review is requested. A

copy of this Final Order shall accompany the petition. Copies of the petition must be served upon the Commission and all parties of record in this proceeding.

Entered this the 14<sup>TH</sup> day of December 2006.

A handwritten signature in black ink, appearing to read "DMD", with a long horizontal flourish extending to the right.

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DENISE MOORE DAVIDSON, CHAIR  
MINE SAFETY REVIEW COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing FINAL ORDER was served by certified mail, return receipt requested, and by regular mail, postage pre-paid to the following this 18<sup>TH</sup> day of December 2006:

**GARY MICHAEL YOUNG  
4645 RIGHT FORK OF BRUSHY  
VARNEY, KENTUCKY 41571**

*Petitioner*

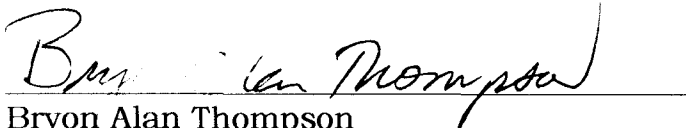
And by messenger mail to:

SUSAN C. BUSH, COMMISSIONER  
DEPARTMENT FOR NATURAL RESOURCES,  
#2 HUDSON HOLLOW,  
FRANKFORT KY 40601

HON. C. MICHAEL HAINES,  
GENERAL COUNSEL  
OFFICE OF LEGAL SERVICES  
NATURAL RESOURCES LEGAL DIVISION  
#2 HUDSON HOLLOW  
FRANKFORT KY 40601  
502/ 564- 2356  
FAX 502/ 564 - 9212

And the original shall be kept on file:

Mine Safety Review Commission  
132 Brighton Park Blvd.  
Frankfort Ky 40601

A handwritten signature in cursive script, reading "Bryan Alan Thompson", is written over a horizontal line.

Bryan Alan Thompson  
Hearing Officer & General Counsel  
Mine Safety Review Commission